

AMENDED IN SENATE APRIL 28, 2005

**SENATE BILL**

**No. 627**

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**Introduced by Senator Ackerman**

February 22, 2005

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An act to amend Section 25118 of the Corporations Code, relating to corporations.

LEGISLATIVE COUNSEL'S DIGEST

SB 627, as amended, Ackerman. Corporations: usury.

Existing law provides an exemption from state usury provisions for loans that meet certain requirements, with specified financial statements as necessary evidence. Existing law provides that this exemption does not apply to specified evidences of indebtedness and transactions.

This bill would also provide that this exemption from state usury provisions does not apply to ~~an any evidence of~~ indebtedness secured, in whole or in part, by real property ~~and to an indebtedness with a maturity date that exceeds one year~~ owned or leased by the borrower, provided that certain conditions are met.

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 25118 of the Corporations Code is
- 2 amended to read:
- 3 25118. (a) An evidence of indebtedness issued by an entity
- 4 or guaranteed by an entity that is an affiliate (as defined in
- 5 Section 150) of the borrower that, on the day the evidence of
- 6 indebtedness issued or guaranty is first issued or entered into, has

1 total assets of at least two million dollars (\$2,000,000) according  
2 to its then most recent financial statements, and the purchasers or  
3 holders thereof, shall be exempt from the usury provisions of the  
4 California Constitution. The financial statements referred to in  
5 the preceding sentence shall meet both of the following  
6 requirements:

7 (1) Be as of a date not more than 90 days prior to the date the  
8 evidence of indebtedness or guaranty is first issued or entered  
9 into.

10 (2) Be prepared in accordance with either of the following:

11 (A) In accordance with generally accepted accounting  
12 principles and, if the entity has consolidated subsidiaries, on a  
13 consolidated basis.

14 (B) In accordance with the rules and requirements of the  
15 Securities and Exchange Commission, whether or not required by  
16 law to be prepared in accordance with those rules and  
17 requirements.

18 (b) Any one or more evidences of indebtedness, and the  
19 purchasers or holders thereof, shall be exempt from the usury  
20 provisions of the California Constitution if either of the following  
21 applies:

22 (1) The evidences of indebtedness aggregate at the time of  
23 issuance at least three hundred thousand dollars (\$300,000) in  
24 original face amount, or, if the evidences of indebtedness are  
25 purchased with original issue discount, they are purchased for an  
26 aggregate purchase price at the time of issuance of at least three  
27 hundred thousand dollars (\$300,000).

28 (2) The evidences of indebtedness are issued pursuant to a  
29 bona fide written commitment for the lending to the issuer of at  
30 least three hundred thousand dollars (\$300,000), or the provision  
31 of a line of credit to the issuer in a principal amount of at least  
32 three hundred thousand dollars (\$300,000). The exemption  
33 provided by this paragraph shall not be affected by a subsequent  
34 event of default or other event not in the lender's control that has  
35 relieved or may relieve the lender from its commitment.

36 (c) Any evidence of indebtedness described in subdivision (a)  
37 or (b), and the purchasers or holders thereof, shall be entitled to  
38 the benefits of the usury exemption contained in this section  
39 regardless of whether, at any time after the evidence of  
40 indebtedness or guaranty upon which the exemption is based is

1 first issued or entered into, the evidence of indebtedness or  
2 guaranty is determined by a court of competent jurisdiction not to  
3 be a “security.”

4 (d) This section creates and authorizes a class of transactions  
5 and persons pursuant to Section 1 of Article XV of the California  
6 Constitution.

7 (e) This section does not apply to:

8 (1) Any evidence of indebtedness issued or guaranteed (if the  
9 guaranty is part of the consideration for the indebtedness) by an  
10 individual, a revocable trust having one or more individuals as  
11 trustors, or a partnership in which, at the time of issuance, one or  
12 more individuals are general partners.

13 (2) Any transaction subject to the limitation on permissible  
14 rates of interest set forth in paragraph (1) of the first sentence of  
15 Section 1 of Article XV of the California Constitution.

16 ~~(3) Any indebtedness secured, in whole or in part, by real~~  
17 ~~property.~~

18 ~~(4) Any indebtedness with a maturity date that exceeds one~~  
19 ~~year.~~

20 *(3) Any evidence of indebtedness secured, in whole or in part,*  
21 *by real property owned or leased by the borrower, provided that*  
22 *the primary purpose of the extension of credit is to finance the*  
23 *acquisition, ownership, development, sale, or leasing of the real*  
24 *property or improvements thereon, and provided that the credit*  
25 *was not extended by an institutional investor as described in*  
26 *paragraph (1) of subdivision (i) of Section 25102.*

27 (f) The exemptions created by this section shall only be  
28 available in a transaction that meets either of the following  
29 criteria:

30 (1) The lender and either the issuer of the indebtedness or the  
31 guarantor, as the case may be, or any of their respective officers,  
32 directors, or controlling persons, or, if any party is a limited  
33 liability company, the managers as appointed or elected by the  
34 members, have a preexisting personal or business relationship.

35 (2) The lender and the issuer, or the lender and the guarantor,  
36 by reason of their own business and financial experience or that  
37 of their professional advisers, could reasonably be assumed to  
38 have the capacity to protect their own interests in connection  
39 with the transaction.

1 (g) For purposes of this section, “preexisting personal or  
2 business relationship” and “capacity to protect their own interests  
3 in connection with the transaction” as used in subdivision (f)  
4 shall have the same meaning as, and be determined according to  
5 the same standards as, specified in paragraph (2) of subdivision  
6 (f) of Section 25102 and its implementing regulations provided  
7 that, solely with respect to this section, a lender or purchaser who  
8 is represented by counsel may designate that person as its  
9 professional adviser whether or not that person is compensated  
10 by the issuer or guarantor, as long as that person has a bona fide  
11 attorney-client relationship with the lender or purchaser.  
12 (h) This section shall not exempt any person from the  
13 application of the California Finance Lenders Law (Division 9  
14 (commencing with Section 22000) of the Financial Code).